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NO. 87-955

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

KEVIN PICKNEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF Illinois,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED FOR REVIEW

Whether the trial court properly admitted codefendant's statements into evidence based on the co-conspirator exception to the hearsay rule where there was evidence sufficient to independently establish the existence of a conspiracy.

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OPINION BELOW

Following a bench trial, the Petitioner was found guilty of delivery of a controlled substance and was sentenced to six years imprisonment by Judge Michael P. Toomin of the Circuit Court of Cook County, Illinois. The Appellate Court of Illinois affirmed the conviction and sentence. (No.

85-2356, December 17, 1986). See Petitioner's Appendix A. Petitioner's petition for leave to appeal to the Supreme Court of Illinois was denied on October 7, 1987. See Petitioner's Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257. However, as treated more fully below, Respondent submits that no good reason exists for this Court to grant the instant petition for writ of certiorari.

STATEMENT OF FACTS

Petitioner was charged, by indictment, with one count of delivery of more than 30 grams of cocaine in violation of Ill. Rev. Stat. (1983) ch. 56½, sec. 1401(a)(2). In a bench trial before the Honorable Michael P. Toomin, petitioner was found guilty and was sentenced to 6 years imprisonment in the Illinois Department of Corrections.

On July 11, 1984, at 12:00 o'clock in the afternoon, Officers Nathaniel Reed and Cassandra Black were seated in an unmarked Chicago police car at 93rd Street and Chappel. They were waiting to make an undercover narcotics buy from Curtis Epps. (R. 2, 3, 8, 33) The officers had arranged to make this purchase earlier that day. (R. 33, 34) At approximately 12:15, Epps entered

the officers' car and told them that "his man was late and he will be delivering the package in about a half hour." (R. 9) Epps then told the officers to drive to his home located at 9237 South Clyde. (R. 9, 10)

After arriving at this address, Epps got out of the car and sat on his front porch while the officers waited in their car. (R. 10, 36) Approximately a half hour later, a blue Oldsmobile, driven by petitioner, pulled up behind the unmarked police car. (R. 11, 36-38) Upon seeing the Oldsmobile pull up, Epps left the porch and approached the car. (R. 11, 12) As he did so, Epps had nothing in his hands. (R. 15) Epps spoke to petitioner for a few minutes and petitioner handed Epps a clear plastic bag containing white powder. (R. 37, 38) The contents of the bag weighed 54.40 grams and contained cocaine. (R. 65)

After receiving the cocaine from petitioner, Epps entered the officers' car and said "my man dropped off a package." (R. 13) Officer Reed replied that he wanted to inspect the contents down the street. He drove northbound on Clyde, made a left turn, and parked between Clyde and Chappel. (R. 15) As they drove to this location, Epps stated "my man that dropped the package ... will be back in approximately 10 or 15 minutes to pick up his share of money." (R. 16) After parking the car, the officers inspected the cocaine and handed Epps $4,700. (R. 17) Epps was then arrested. (R. 18, 42)

After arresting Epps, Officer Reed searched him and recovered $4,700 and a pager. (R. 22, 23) Officer Reed had previously used the pager 6 or 7 times to contact Epps. (R. 23, 34)

After searching Epps, Officers Reed and Black proceeded back to 9237 South Clyde and waited for petitioner to return. (R. 18) About 10 minutes later, the blue Oldsmobile, driven by petitioner, pulled up. (R. 45) The car slowed down and hesitated in front of Epps' house. (R. 19, 45) Petitioner looked around and then suddenly drove his car northbound on Clyde. (R. 19) Officer Mark Sanders and his partner, who were working surveilance, stopped petitioner and placed him under arrest. (R. 54)

After placing petitioner under arrest, Officer Sanders searched him and recovered a wallet containing $100. (R. 55) Officer Sanders also searched the blue Oldsmobile and recovered a grey tote bag which contained $890 and a pager similar to the one recovered from Epps. (R. 55, 57, 58)

After presenting several stipulations, the People rested. (R. 66) Petitioner then rested. (R. 69)

After hearing argument, both sides submitted memorandums of law on various issues, including the admissibility of Epps' statements. (R. 67-107, C150-179) After hearing further argument, petitioner was found guilty and sentenced to six years imprisonment. (R. 107-135)

REASON FOR DENYING THE WRIT

THE TRIAL COURT PROPERLY ADMITTED CODEFENDANT'S STATEMENTS INTO EVIDENCE BASED ON THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE WHERE THERE WAS EVIDENCE SUFFICIENT TO INDEPENDENTLY ESTABLISH THE EXISTENCE OF A CONSPIRACY.

Petitioner Kevin Pickney petitions this Honorable Court for a Writ of Certiorari to the Appellate Court of Illinois and alleges that admissions of his co-conspirator were improperly admitted into evidence. The People maintain that the petition should be denied based on the fact that the grounds raised by petitioner do not form a sufficient basis upon which to grant a Writ of Certiorari. Petitioner improperly asks this Court to "...reiterate the principle that

before the prosecution can introduce hearsay statements by an alleged co-conspirator, the prosecution must establish the existence of a conspiracy by evidence independent of the hearsay statements." (Petitioner's Petition at 5) The People maintain that it is unnecessary to grant Petitioner's petition in order to "reiterate" this already well settled rule of law.

It is well established that under the declarations of co-conspirators exception to the hearsay rule,

> such declarations are admissible against all conspirators upon an independent, prima facie evidentiary showing of a conspiracy or joint venture between the declarant and one of the other defendants, insofar as such declarations are

made in furtherance of and during the pendency of the conspiracy, even in the absence of a conspiracy indictment.

People v. Goodman, 81 Ill. 2d 278, 408 N.E.2d 215, 216 (1980); United States v. Nixon, 418 U.S. 683, 701, 94 S. Ct. 3090, 3104, 41 L. Ed.2d 1039, 1060 (1974). It is equally well established that the burden of proof for such an independent prima facie showing of a conspiracy is by a preponderance of the evidence. People v. Deatherage, 122 Ill. App. 3d 620, 461 N.E.2d 631 (3rd Dist. 1984); United States v. Cicale, 691 F. 2d 95, 103 (2nd Cir. 1982). Further, "it is well-settled law that participation in a conspiracy need not be proved by direct evidence." United States v. Cole, 755 F.2d 748, 755 (11th cir. 1985). In fact the proof

may be totally circumstantial. Cicale, 691 F.2d at 103. Additionally, the prima facie showing of conspiracy may be made before or after the introduction of the alleged hearsay testimony. People v. Fuller, 117 Ill. App. 3d 1026, 1037, 454 N.E.2d 334 (1st Dist. 1983). Finally, the existence of a conspiracy "... may be inferred from all the surrounding facts and circumstances, including the acts and declarations of the accused defendant." Id., 454 N.E.2d at 343.

The People maintain that the trial court properly found sufficient independent evidence to establish the existence of a conspiracy in this case. Prior to ruling on this issue, the trial court heard extensive oral argument. Additionally, both sides submitted memorandums of law. Finally, the trial court itself did legal research. In concluding that there was sufficient

independent evidence to establish the conspiracy the trial court relied, inter alia, on People v. Jackson, 49 Ill. App. 3d 1018, 364 N.E.2d 975 (2nd Dist. 1977) and United States v. Trowery, 542 F.2d 623 (1976). (R. 118-119) The trial court found that based on petitioner's actions there was a prima facie showing of his involvement in the conspiracy. (R. 120) Specifically, the court noted petitioner's delivery of the cocaine to co-defendant Epps, his failure to receive any proceeds at the time of the delivery and his return to the scene a short time later. (R. 120)

The Appellate Court of Illinois also found sufficient independent evidence of a conspiracy. In affirming the trial court, the Appellate Court held:

In the instant cause, there was sufficient independent evidence of a conspiracy. As we have indicated, after police officers arranged to purchase cocaine from codefendant, they drove him to his residence where he sat on a porch to await defendant. The officers remained nearby in their vehicle. When defendant arrived in an Oldsmobile, codefendant, who was empty-handed, approached the car, talked to defendant, leaned inside the vehicle, then returned to the officers' car carrying a transparent bag containing a white substance. When the officers inspected the package, they determined it contained cocaine and

arrested codefendant. The officers then returned to codefendant's residence and awaited defendant. Within 10 minutes the latter returned, stopped his car, and sped away, but was arrested by other members of the surveillance team. Codefendant had informed the officers that defendant was "his man" who would bring the cocaine and expected to be paid. The statements of codefendant facilitated the conspiracy to sell the cocaine to the officers. We believe that the officers' testimony regarding codefendant's statements, which identified defenant's participation in the narcotics transaction, were admissible as the statements of a

> coconspirator and served to prove defendant's guilt beyond a reasonable doubt. (Petitioner's Petition 15-16)

Based on all of the foregoing the People maintain that both the trial court and the Appellate Court ruled properly in the instant case. There was overwhelming evidence to show a conspiracy. The evidence is undisputed that approximately a half hour after the officers and Epps arrived at Epps' home, a blue Oldsmobile driven by petitioner pulled up behind the police car. (R. 11, 36-38) Epps then walked over to petitioner's car and spoke to him for a few minutes. (R. 11, 12, 37, 38) After talking to Epps for a few minutes, petitioner handed Epps a clear, plastic bag containing cocaine. (R. 37, 38, 65) Petitioner drove away. (R.

39) Epps then delivered the cocaine to the undercover officers and was arrested. (R. 18, 42) Later petitioner returned to the location of the sale, looked around, and then attempted to flee. (R. 19, 45)

Clearly, this evidence supports the finding that a prima facie showing of a conspiracy had been established. It can certainly be inferred from petitioner's actions that he and Epps had an agreement to sell cocaine to Officers Reed and Black. Therefore, the testimony of Officer Reed concerning statements made by Epps was properly admitted.

As petitioner has failed to raise any important constitutional issue or present any grounds which would justify the consumption of this Court's valuable time, the instant Petition for Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this Honorable Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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